FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 28 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

No. 642

MINNIE KEYES, *Petitioner,*

v.

K. E. MADSEN, Assistant Engineer Commissioner in Charge of Buildings for the District of Columbia, et al., *Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MINNIE KEYES,
*Petitioner*

W. GWYNN GARDINER
600 Woodward Bldg.
Washington, D. C.

JAMES M. EARNEST
640 Woodward Bldg.
Washington, D. C.
*Attorneys for Petitioner*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX TO PETITION.


| | Page |
|---|---|
| Statement of Matters Involved | 2 |
| Prior Proceedings in District Court | 3 |
| Present Proceedings in District Court | 3 |
| Decision of U. S. Court of Appeals | 4 |
| Statement of Jurisdiction | 5 |
| Questions Presented | 6 |
| Reasons Relied on for the Allowance of the Writ | 6 |


## INDEX TO BRIEF.


| | |
|---|---|
| The Question of the Constitutionality of the Statute is Properly Before This Court | 9 |
| The Statute is Unconstitutional on Its Face as it Fails to Prescribe Proper Standards | 10 |
| The Statute as Applied to Petitioner's Properties is Void Because it Violates the Fifth Amendment to the Constitution | 21 |
| The Petitioner Has Been Denied a Fair Hearing by Unwarranted Action of the Pretrial Judge | 25 |
| Appendix to Brief | 28 |


### Table of Cases Cited.


| | |
|---|---|
| A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233, 45 S. Ct. 295 | 15 |
| Chesapeake & Ohio Ry. Co. v. McDonald, 214 U. S. 191, 29 S. Ct. 546 (1909) | 9 |
| Chicago M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 20 S. Ct. 336 | 26 |
| City of Owensboro v. Owensboro Water Works Co., 191 U. S. 358, 24 S. Ct. 82 | 26 |

Page

Cline v. Frink Dairy Co., 274 U. S. 445, 47 S. Ct. 681 .. 20
Connally, Commissioner of Labor of Oklahoma v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126..18
Corrigan v. Buckley, 271 U. S. 323, 331, 46 S. Ct. 521 .. 10
Hygrade Provision Co., Inc., et al. v. Sherman, Att. Gen. of New York, et al., 266 U. S. 497, 45 S. Ct. 141 20
Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618 ... 13
Oklahoma Natural Gas Co. v. Russell, et al., 261 U. S. 290, 43 S. Ct. 353 ..... 26
People v. Mancuso, 255 N. Y. 463, 175 N. E. 177, 67 A. L. R. 514 ..... 20
Ronkendorff v. Taylor's Lessee, 29 U. S. 349, 4 Pet. 349, 7 L. Ed. 882 ..... 24
Saginaw Broadcasting Co. v. Federal Communications Commission, 68 App. D. C. 282, 96 F. (2d) 554 .... 24
Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496 (1910) ..... 9
Standard Chemicals Corp. v. Waugh, 231 N. Y. 51, 131 N. E. 566 ..... 15
United States v. L. Cohen Grocery Co., 255 U. S. 81, 41 S. Ct. 298 .....12, 16
Wabash Ry. Co. v. St. Louis, 64 F. (2d) 921, 929 (C.C.A. 8th 1943), cert. denied 290 U. S. 668, 54 S. Ct. 88 (1933) ..... 9
Weeds v. United States, 225 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537 ..... 16
Wilson Cypress Co. v. Del Pozo y Marcos, 236 U. S. 635, 35 S. Ct. 446 ..... 26

STATUTES CITED.

Title 28, Sec. 1245, U. S. C. A. ..... 5
Sec. 5-601-3 D. C. Code, 1940 .....10, 21
Sec. 5-614 D. C. Code, 1940 ..... 24

INDEX TO STATUTES IN APPENDIX.

Sec. 5-601, 1940 D. C. Code ..... 28
Sec. 5-603, D. C. Code, 1940 ..... 28
Sec. 5-606, D. C. Code, 1940 ..... 29

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

---

No. .

---

MINNIE KEYES, *Petitioner,*

v.

K. E. MADSEN, Assistant Engineer Commissioner in Charge of Buildings for the District of Columbia, et al., *Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

---

*To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Minnie Keyes, being aggrieved by the decision of the United States Court of Appeals for the District of Columbia, handed down the 16th day of December, 1949, in the case entitled before it as "Minnie Keyes, Appellant, v. K. E. Madsen, Assistant Engineer Commissioner in Charge of Buildings for the District of Columbia, et al., Appellees, No. 9969," not yet officially reported but appearing in the record at Pages 55-58, respectfully represents and shows unto the Court that:

## I.

### Statement of Matters Involved.

Petitioner, Minnie Keyes, is the owner in fee simple of eleven attached houses in the southwest section of the District of Columbia. By letter, dated November 29, 1944, she was notified by the District of Columbia Board for the Condemnation of Insanitary Buildings (sometimes hereinafter referred to as the Board) that the eleven houses had been inspected and were found to be in such an *insanitary condition* as to endanger the health and lives of their occupants and persons in the vicinity. Petitioner was required to show cause within not more than 10 days why the eleven buildings should not be condemned. On January 2, 1945, the Board advised petitioner that (1) a condemnation order had been entered and that (2) no party should occupy such buildings from and after 15 days subsequent to said order being affixed to the condemned buildings.

Upon petitioner's application, dated January 23, 1945, the Board granted an extension of time until February 27, 1945, in which to make the necessary repairs. Petitioner proceeded with due diligence to make all necessary repairs. Upon the completion thereof, she requested that such repairs be inspected and approved and that the Board cancel its order of condemnation. After inspection, the Board informed petitioner that it declined to cancel the order. Petitioner sought advice from the Board as to wherein the repairs made by her were inadequate or failed to remedy in a satisfactory manner the conditions which led to the condemnation. She was advised to rat-proof the foundations of the buildings, repair the window frames, install window glass and do certain repairs to the plastering in the interior of the buildings. Petitioner therefore made such additional repairs and after persistent requests to the Board, the Board personally appeared at the premises on January 21, 1947, some two years after the issuance of said order, and inspected only two (2) of the eleven (11) buildings although all were open to inspection. By letter, dated

February 27, 1947, the Board then advised petitioner that the repairs had not been adequately made and consequently refused to rescind its order on any of the eleven (11) buildings.

## II.

### Prior Proceedings in District Court.

On March 22, 1946, petitioner instituted an action against the Board in the United States District Court for the District of Columbia, and sought to have the Court adjudge the statute under which the Board had proceeded[1] to be violative of the Fifth Amendment of the Constitution, as applied to her property; to hold the condemnation order null and void and to require the Board to cancel it by reason of the fact that all necessary repairs ordered by the Board had been fully completed.

This action was dismissed on motion of the Board on June 10, 1946. No appeal was taken therefrom. Instead, petitioner proceeded to make all additional repairs as directed by the Board, following her inquiry as to precisely wherein the previous repairs made were deficient, hereinabove mentioned. When the Board nevertheless again refused to lift the order of condemnation, it became necessary for petitioner to institute the present action.

## III.

### Present Proceedings in District Court.

Accordingly, on April 9, 1947, petitioner brought this action against the Board in the United States District Court for the District of Columbia alleging that she had proceeded with due diligence to make all necessary repairs, that the houses were safe for human occupancy and that the statute as applied to her property violated the Fifth Amendment (R. 2-8). The Board answered denying the allegations of the complaint that adequate repairs had been

[1] Title 5, Sec. 601 et seq., as amended, D. C. Code (1940).

made and denied that the houses were sound, sanitary and safe for human habitation, and further relied upon the dismissal of the former action in the District Court as res judicata. (R. 9-14, 25-26)

Upon the issue thus raised and after a pre-trial hearing (R. 26-28), pursuant to which the pretrial judge erroneously removed the issue of unconstitutional application of the statute as to petitioner from the case, the case duly came on for trial in the District Court on March 9, 1948. The trial judge personally inspected the premises, accompanied by counsel, and then heard petitioner's evidence. The Board rested and, after denying a motion by the Board for judgment on petitioner's case (R. 46), and making findings of fact (R. 47-52) and conclusions of law (R. 52-54) the trial court entered a judgment in favor of the Board on April 20, 1948 (R. 54).

Whereupon petitioner took an appeal to the United States Court of Appeals for the District of Columbia (R. 54).

## IV.

### Decision of U. S. Court of Appeals.

Petitioner had alleged in her complaint that the statute was being unconstitutionally applied to her and in her argument before the Court of Appeals, she also attacked the statute as being unconstitutional on its face. As heretofore stated the defense of an unconstitutional application of the statute had been erroneously taken from the case by the pretrial judge as shown by the following portion of his order:

> "However, the Pretrial Judge having before him the complaint and answer is of the opinion that the allegation of the answer taken together do not establish the case of unconstitutionality of the Statute as applied, and that issue is therefore taken out of the case, leaving to the Trial Court to determine whether or not there was such a sufficient compliance with the order of the Board as to make its refusal to lift its order of condemnation unreasonable and arbitrary." (R. 27)

The Court of Appeals held this was error because the allegations of the complaint amount to a charge of deprivation of property without due process of law. The Court of Appeals held the Board's answer raised an issue of fact as to whether the houses were insanitary to the extent that their condemnation was justified by the statute but that this constitutional question depended upon the condition of the buildings.

The Court of Appeals held, however, that the decision of the District Court in regard to the sanitary condition of the buildings was supported by substantial evidence and that the error of the pretrial judge was therefore immaterial. On this basis the Court of Appeals held that the order of condemnation did not deprive petitioner of her property without due process of law.

Petitioner also argued before the Court of Appeals that the statute on its face is unconstitutional because Congress, in delegating the power to condemn buildings so insanitary as to endanger the lives of their occupants or of persons living in the vicinity, did not establish sufficient standards for the guidance of the Board. Even though the Court of Appeals stated that petitioner, having failed to raise this issue in the District Court, could not then raise it, the Court held that the statute did not violate the Fifth Amendment in that regard.

## V.

### Statement of Jurisdiction.

The United States Court of Appeals for the District of Columbia entered a Judgment on December 16, 1949 (R. 59).

Jurisdiction of this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia is invoked under Title 28, Sec. 1245, U.S.C.A.

## VI.

### Questions Presented.

1. Whether the decision by the Court of Appeals that the statute was constitutional properly presents this question to this Court even though not raised in the District Court when it was raised, argued and *decided* in the Court of Appeals.

2. Whether in delegating power to condemn buildings when their sanitary conditions are such as to endanger the lives of their occupants or of persons living in the vicinity thereof, Congress set forth sufficient standards in the statute to guide the administrative body and the property owners where the administrative body has failed to amplify the statute by valid rules and regulations promulgated thereunder thus leaving unascertainable criteria for the guidance of the Board and the property owners.

3. Whether the statute as applied to the petitioner's properties is void because it violates the Fifth Amendment to the Constitution.

4. Whether the error of the pretrial judge in taking from the case the question of unconstitutional application of the statute to the petitioner's property was immaterial because ostensibly corrected by the trial court's findings which the Court of Appeals held to be supported by substantial evidence.

## VII.

### Reasons Relied On for the Allowance of the Writ.

1. Petitioner has been denied due process of law in that the application of the statute to petitioner's property is unconstitutional.

2. Petitioner has been denied due process of law in that in delegating power by statute to condemn buildings when

their sanitary conditions are such as to endanger the lives of their occupants or of persons living in the vicinty thereof, Congress did not set forth sufficient standards in the statute to guide the administrative body and the property owners in the absence of valid rules and regulations promulgated thereunder.

3. Petitioner has been denied due process of law in that the pretrial judge improperly took the question of unconstitutional application of the statute to petitioner's property from the case.

4. Petitioner has been denied due process of law in that the trial court, in making its findings of fact, went clearly beyond the issues before it and, misled by the uncertainty of the language of the statute which purported to set out a standard, drew unwarranted conclusions of law on which it based its judgment.

5. The decision of the United States Court of Appeals for the District of Columbia is in conflict with applicable and controlling decisions of this Honorable Court.

6. The United States Court of Appeals for the District of Columbia has decided an important question of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the United States Court of Appeals for the

District of Columbia be reversed by this Honorable Court and your petitioner have such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

MINNIE KEYES,
*Petitioner*

W. GWYNN GARDINER
600 Woodward Bldg.
Washington, D. C.

JAMES M. EARNEST
640 Woodward Bldg.
Washington, D. C.
*Attorneys for Petitioner*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949.

---

No.

---

MINNIE KEYES, *Petitioner,*

v.

K. E. MADSEN, Assistant Engineer Commissioner in Charge of Buildings for the District of Columbia, et al., *Respondents.*

---

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

---

### I.

### The Question of the Constitutionality of the Statute Is Properly Before This Court.

While the Court of Appeals held that petitioner should not be permitted to raise the question of the unconstitutionality of the statute before it as it had not done so below, it nevertheless went on to decide the question. In support of its position, the Court of Appeals cited a number of cases, i.e., "*Wabash Ry. Co.* v. *St. Louis,* 64 F. (2d) 921, 929 (C.C.A. 8th 1933), *cert. denied* 290 U. S. 668, 54 S. Ct. 88 (1933); *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 30 S. Ct. 496 (1910); *Chesapeake & Ohio Ry. Co.* v. *McDonald,* 214 U. S. 191, 29 S. Ct. 546 (1909)."

Each of these cases involved writs of error or removal from State Courts where a question of unconstitutionality of State legislation was raised for the first time in a federal court. Now it is true as a general proposition of law that this Court will not consider the constitutionality of state legislation where that issue was not raised in the state court. Obviously this Court should not pass on state legislation until the highest court in the state has been afforded an opportunity to speak. But that is not the situation here.

In this case, the Court of Appeals, the highest court in the District of Columbia has spoken. And it passed upon the constitutionality of an Act of Congress. But the final word in respect of any congressional legislation has not been said until this Court has spoken.

Since the Court of Appeals has chosen to consider and pass upon the constitutionality of the statute here in issue, then petitioner should be allowed to present it here for the consideration of this Court. If the Court of Appeals is in error, as petitioner contends, then the decision of the Court of Appeals in and of itself denies petitioner due process of law. Compare: *Corrigan* v. *Buckley*, 271 U. S. 323, 331, 46 S. Ct. 521.

## II.

### The Statute Is Unconstitutional On Its Face As It Fails To Prescribe Proper Standards.

The language of Sections 5-601 and 603, D. C. Code, 1940 (Appendix), as amended prescribes uncertain and indefinite standards and in the absence of ascertainable criteria offends due process.

The language of Sections 5-601 and 603, D. C. Code 1940 (Appendix) is so general, uncertain and indefinite that it cannot in itself constitute a rule of law which can be enforced without offending due process.

Section 601 creates a Board and bestows upon it jurisdiction and authority to examine into the sanitary conditions of all buildings in the District and " . . . to condemn

those buildings which are in *such insanitary condition as to endanger the health or lives of the occupants thereof or of persons living in the vicinity.*" (Emphasis added)

Section 603 provides that "If any building or part of a building be found ... to be in *such insanitary condition as to endanger the health or the lives of the occupants thereof or of persons living in the vicinity,* said board shall cause a notice to be served on the owner ... requiring him to show cause ... why such building should not be condemned. And if within the time specified in said notice no cause be shown sufficient in the opinion of the majority of said board to prevent the condemnation of such building ... said board shall issue an order condemning such building ..." (Emphasis added.)

This is the sole standard or principle prescribed for the Board for the Condemnation of Insanitary Buildings. There is no expressed or suggested authority that the said Board formulate rules or regulations for the amplification of the delegated authority. Each inspecting officer, agent, or employee, therefore, detailed for the purpose "to investigate through personal inquiry and inspection" is permitted to set his own individual criteria in the light of the general, uncertain and indefinite standards set forth in the Act.

That this fatal error in delegating authority cannot stand is too well known and uniformly followed to need support of authority. The defective language in this Act has a double unlawful effect in that it also permits an administrative body to condemn private property on a *statute which directs adherence to no ascertainable standards.* What shall be the guide of the property owner in ascertaining when his property is or is not "in such insanitary condition as to endanger the health or the lives of the occupants thereof or of persons living in the vicinity"? The uncertainty of the meaning of this language is fatally defective. There is a total absence of what shall constitute "insanitary conditions." This being the essence

of the law itself, without it the statute is too indefinite and uncertain to support the Board's action.

In *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, a criminal indictment which had been brought by the United States against L. Cohen Grocery Co. was quashed. In affirming the action of the lower Court, this Court decided the constitutionality of Section 4 of the Lever Act (Act Oct. 22, 1919, Tit. 1, C. 80, S. 2, 41 Stat. 297), the pertinent part of which is as follows:

> "That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person (e) to exact excessive prices for necessaries. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000, or be imprisoned for not more than two years, or both."
>
> "In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessaries in the city of St. Louis, was charged with violating this section by willfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary; the specification in the first count being a sale for $10.07 of about 50 pounds of sugar, and that in the second of a 100-pound bag of sugar for $19.50.
>
> "The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; * * * "

The lower court quashed the indictment because:

> "Congress alone has power to define crimes against the United States. This power cannot be delegated

either to the courts or to the juries of this country. * * *

"*Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against* him I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The question for this Court was that of the certainty or uncertainty of the text in question.

"* * * that is, whether the words 'that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of the opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. * * * And again, this condition would be additionally obvious, if we stopped to recur to the persistent efforts which, the records disclose, *were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.*" (Emphasis added)

In *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, Mr. Justice Butler, delivering the opinion of this Court said in part, page 452:

"By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, Sec. 4, R. S. N. J. 1937, 2:136-4, c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment, U. S. C. A. Const. It is as follows: 'Any person not engaged in any lawful occupation, known to be a member of any

gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this, or in any other state, is declared to be a gangster * * *.'"

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U. S. 214, 221, 23 L. Ed. 563; Czarra v. Board of Medical Supervisors, 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484; Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Const. Co., 269 U. S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322."

"The phrase 'consisting of two or more persons' is all that purports to define 'gang.' The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied."

"The descriptions and illustrations used by the court to indicate the meaning of 'gang' are not sufficient to constitute definition, inclusive or exclusive. The Court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it does not purport to give any interpretation generally applicable. The state court did not find, and we cannot, that 'gang' has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful. * * *

"The lack of certainty of the challenged provision is not limited to the word 'gang' or to its dependent 'gangster.' Without resolving the serious doubts arising from the generality of the language, we assume that the clause 'any person not engaged in any lawful

> occupation' is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression 'known to be a member.' It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a 'gang.'"

In *Standard Chemicals Corp.* v. *Waugh,* 231 N. Y. 51, 131 N. E. 566, Justice Cardozo in considering the effects of vague and indefinite language said in part:

> "I feel constrained to hold, in adherence to the ruling of the Supreme Court of the United States in U. S. v. L. Cohen Grocery Co. (decided February 28, 1921, 255 U. S. 81; 41 S. C. Rep. 298) and Weeds v. U. S. (255 U. S. 109; 41 S. C. Rep. 306), that the prohibition of the Lever Act is void, and that illegality cannot result from the failure to obey it. I do not overlook the fact that the court was there dealing with a criminal prosecution. *The ground on which it placed its judgment applies, and with like consequences, to civil suits as well.* The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. No test had been supplied, as where statutes direct adherence to reasonable or market values. * * * ."
>
> "Since the decision of the Supreme Court, the fact of indefiniteness is no longer open to inquiry. The lack of any standard, either expressly established, or ascertainable, with approximate certainty from sources aliunde, is to be accepted as a datum. Disobedience is impossible unless there is something to be obeyed. . ." (Emphasis added.)

In *A. B. Small Co.* v. *American Sugar Refining Co.,* 267 U. S. 233, 45 S. Ct. 295, this Court applies the measures of certainty to statutes *involving civil liability.*

This was an action to recover for the breach of two contracts for the sale by a sugar refiner to a wholesale dealer of 35,000 pounds of refined sugar—the breach consisting in the buyer's refusal to accept the sugar when delivered. The plaintiff secured a verdict and judgment in the District Court; and the defendant prosecutes this direct writ of error, a constitutional question, among others being involved.

In its answer the defendant set up two defenses expressly based on the Lever Act of August 10, 1917, c. 53, 40 Stat. 276, Sec. 1, 4, as amended by the Act of October 22, 1919, c. 80, 41 Stat. 297, Sec. 1, 2 (Comp. St. Ann. Supp. 1923 Sec. 31151/8 e, 31151/8 ff), and on orders and regulations made thereunder. One defense was to the effect that the plaintiff was not entitled to "more than one per cent per pound profit on what the sugar cost, which was the prima facie reasonable profit fixed by the president," and in no event was entitled to "more than a reasonable profit." The other defense was to the effect that the contracts were unlawful, because they provided for delivery at a future time, more than thirty days away, and thereby "tended to increase the price of sugar and to promote the hoarding thereof." Each of these defenses was challenged by a demurrer on the grounds: First, that the facts alleged were not sufficient to constitute a defense under the Lever Act; and, secondly, that that act was in conflict with the Fifth Amendment to the Constitution and void. The demurrers were sustained on the second ground; and the defendant assigns error on that ruling.

Section 4 provided it should be "unlawful for any person willfully to make any unjust or unreasonable charge in dealing in or with any necessaries," or to agree with another "to exact excessive prices for any necessaries." In a series of cases, of which *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045, and *Weeds Inc.* v. *United States*, 225 U. S. 109, 41 S. Ct. 306, 65 L. Ed. 537, are examples, the court

held that provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should confirm to a rule of standard which was so vague and indefinite that no one could know what it was. By copious references to judicial pronouncements and proceedings the court illustrated what the terms "unjust," "unreasonable," and "excessive" as applied to prices by that provision had no commonly recognized or accepted meaning.

The Court said in part, page 239:

> "The defendant attempts to distinguish those cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings. Standard Chemicals, etc., Corporation v. Waugh Chemical Corporation, 231 N. Y. 51, 54, 131, N. E. 566, 14 A. L. R. 1054; Dunman v. South Texas Lumber Co. (Tex. Civ. App.) 252 S. W. 274, 275. In the first of these citations, the Court of Appeals of New York, referring to this court's ruling in the Cohen Grocery Co. case, well said:
>
> 'The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty has been established. The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty.'

> "As Section 4 was invalid, whether taken as a civil regulation or as a criminal statute, it follows that in so far as the special defenses were based on it the demurrers were rightly sustained."

In *Connally, Commissioner of Labor of Oklahoma* v. *General Construction Co.*, 269 U. S. 385, 46 S. Ct. 126, this Court affirmed an interlocutory decree (3 F. (2d) 666) which enjoined certain state and county officers from enforcing the provisions of sections 7255 and 7257, compiled Oklahoma Statutes 1921, when it was challenged as being unconstitutional because of the uncertainty of the meaning of its terms, "current rate" and "in the locality."

Section 7255 provides in part:

> "That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, . . ."

The construction company, under contracts with the state, was engaged in constructing certain bridges within the state. In such work, it employed a number of laborers, workmen, and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day, and the amount so agreed upon was reasonable and commensurate with the services rendered and agreeable to the employee in each case. The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $3.60.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under authority of a statute of Oklahoma, which imposed upon him the duty of carrying into affect all laws in relation to labor.

The constitutional grounds of attack, among others, were that the statutory provisions, if enforced, would deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in viola-

tion of the Fourteenth Amendment of the Federal Constitution; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; that the term "locality" itself is fatally vague and uncertain.

This Court said, pages 391, 392:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."
>
> "We come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees 'not less than the current rate of per diem wages in the locality where the work is performed.'
>
> "We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory, surrounding the bridges under construction."
>
> "In the second place, additional obscurity is imparted to the statute by the use of the qualifying word 'locally.' Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men, moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the State Supreme Court on rehearing in State v. Tibbetts, 205 Pac. 776,

779. But all the court did there was to define the word 'locality' as meaning 'place', 'near the place,' 'vicinity,' or 'neighborhood.' Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word 'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic and dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles."

In the present statute the uncertainty is not cured by delegating to the administrative body the task of rendering the statutory language intelligibly definite by promulgations of rules or regulations. Compare: *In re Peppers,* 189 Cal. 682, 209 Pac. 896, when the court held that even conceding that a legislative attempt was made to confer upon the Department of Agriculture the power to make more certain the questionable clauses in the legislation; nevertheless, the legislature had no power to delegate to an administrative board or its offices the function of determining what acts or omissions on the part of an individual are unlawful.

The uncertainty of the terminology of Section 5-603 is not cured by reason of its having a technical meaning understood by the class of persons affected (See *Hygrade Provision Co., Inc., et al* v. *Sherman, Att. Gen. of New York,* et al. 266 U. S. 497, 45 S. Ct. 141); nor is the language cured by setting up a standard of conduct determinable by reference to common law background (See *Cline* v. *Frink Dairy Co.,* 274 U. S. 445, 47 S. Ct. 681, and *People* v. *Mancuso,* 255 N. Y. 463, 175 N. E. 177, 67 A. L. R. 514).

It can be easily seen then that in an effort to rid the community of an unattractive structure the Board has been led into error by the general, indefinite language of Sections 601 and 603. It has not applied even this most elusive standard of "insanitary condition" in making its findings above, but has in completely disregarding the limitations inherent in proper findings even under this Act encompassed the entire field of structural soundness separate and distinct from the problem of sanitation.

The standard of sanitation which Congress meant to prescribe cannot be ascertained with any reasonable degree of certainty by either the Board, the property owner or the Court. The failure of the Board to formulate an objective definition of "insanity condition," or to provide rules or regulations to guide its members in their determination, or to adequately apprise the property owner of his deficiencies leaves the Act offending in guarantees of due process.

## III.

### The Statute As Applied to Petitioner's Properties Is Void Because It Violates the Fifth Amendment to the Constitution.

The "specification" of the Board (R. 16-23) on which it based its condemnation order against petitioner's properties contains ten alleged defects which allegedly are common to all of petitioner's eleven properties, odd as this may seem.

To conclusively demonstrate the danger of the uncertain language of Sections 601 and 603 one need only to examine this "specification."

The term "insanitary conditions" has been used as a standard to condemn petitioner's property on every ground from esthetic to structural soundness and has permitted deviation so far from any reasonable connotation of the words "insanitary conditions" as to make the "specification" ridiculous.

Assume for purposes of illustration that such unique conditions did exist so as to render each and every of petitioner's eleven properties deficient in identically the same ten different items (R. 16-23) as the Board's purported findings show. An analysis of these alleged deficiencies shows that the Board has embraced within the scope of "insanitary conditions" other unrelated elements.

Below are listed these ten alleged deficiencies together with a comment as to their appropriateness as elements constituting "insanitary conditions."

"1. Siding rotted and removed to such extent that rainwater may enter."

Comment: It is difficult to see in what manner rainwater which would enter between the siding might create an "insanitary condition" that would endanger health or life.

"2. Yard water closet enclosure and housing dilapidated, permitting undue exposure of occupants and permitting rain and snow to enter."

Comment: Can exposure to rain or snow be considered an "insanitary condition"?

"3. Holes in siding and floor, permitting rats to enter and harbor in the building."

Comment: Is the absence of a rat-proof dwelling an "insanitary condition"? If so, how many properties are "sanitary"?

"4. Floors weak, affording danger to life and limb."

Comment: Does a weak floor constitute an "insanitary condition"?

"5. Windows and frames rotted and decayed, preventing glass to remain and preventing the control of heat and ventilation."

Comment: Does the structural condition of a window or its frame affect the sanitation of a dwelling?

"6. Plaster on walls and ceiling broken, permitting vermin to harbor and preventing proper cleaning."

Comment: This alleged defect presupposes the presence of vermin, which may or may not be a fact, and

utterly disregards the obvious fact that in view of the ideal harborage for vermin in furniture, rugs and clothing that wall cracks become only of little significance.

"7. Doors and frames broken, preventing the proper control of heat and ventilation."

Comment: Is not this a structural defect separate from and in no way creating an "insanitary condition"?

"8. Rear sheds dilapidated, affording danger to life and limb and harboring rodents."

Comment: Do the structural deficiencies of a wood, coal or tool shed have any bearing on the sanitary condition of the house proper?

"9. Openings in foundation wall permit rodents to harbor and also afford space for accumulation of refuse."

Comment: The accumulation of refuse is a personal housekeeping habit and the space under a building is no more offensive than an inside closet would be if refuse were allowed to collect.

"10. Sills rotted, allowing building to settle, thus causing floors to be uneven."

Comment: Certainly this alleged defect has no bearing whatsoever on the sanitary conditions of the premises. Even under this Act, must not all condemning deficiencies have as the essence of their defect "insanitary conditions"?

It becomes apparent that the findings of fact upon which the Board allegedly based its conclusions do not adequately apprise the condemned property owner of the factors which caused the order of condemnation to be issued, nor do they

provide her with a "list of improvements" necessary to have the order lifted. The findings are neither specific as to location nor extent and make it practically impossible for the owner to know what she must do to meet "standards of sanitation" nowhere described for her.

In *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 68 App. D. C. 282, 96 F. (2d) 554, on page 562, the Court, when considering the findings of fact, said:

> "This finding is not sufficiently specific to fulfill the requirements we have set forth above."

In *Ronkendorff* v. *Taylor's Lessee*, 29 U. S. 349, 4 Pet. 349, 7 L. Ed. 882, the Court held that to divest an individual of his property against his consent, every substantial requisite of the law must be shown to have been complied with.

This failure to specify with reasonable detail his made such repairing "as will remedy in a manner satisfactory to said Board the conditions which led to the condemnation" unnecessarily difficult if not impossible to achieve. Having made only broad general findings the Board has always been in a position to deny the sufficiency of petitioner's efforts to "remedy the conditions which led to the condemnation."

The viciousness of the Board's action becomes all the more apparent when one realizes that the only effective remedy to combat the Board's arbitrary determinations was lost to petitioner upon the repeal of Sections 5-614 D. C. Code 1940 on December 17, 1942, which had provided for the appointment of "a jury consisting of three disinterested persons, one of whom shall be an architect, the second, a physician or a health officer, and the third, either a structural engineer or a competent builder . . . to inspect the premises—and return to the Court its verdict."

The findings of the Board, stereotyped, general and completely lacking in specificity, being the necessary factual bases for the Board's Order, in the light of vague, uncer-

tain standards delegated by the Act fail to provide the essential requisites of due process.

## IV.

### The Petitioner Has Been Denied a Fair Hearing by Unwarranted Action of the Pretrial Judge.

When the case came on for pre-trial proceedings, the pretrial judge, by the summary process of merely reading the complaint and the answer, held that the allegations taken together "do not establish the case of unconstitutionality of the statute" as applied to petitioner's properties.

Accordingly, he removed the issue of unconstitutional application of the statute from the case. Now the so-called "specification" of the Board (R. 16-23) as we have seen contained ten identical purported defects in each of petitioner's eleven houses. Petitioner asserted that she had made the necessary repairs to correct these defects. In its answer the Board asserted to the contrary. Accordingly, the sole issue before the trial judge was the adequacy of these repairs. The trial judge so ruled and also ruled that the "constitutional questions is reserved", and that petitioner has "the right to appeal." (R. 31)

The Court of Appeals held that it was error on the part of the pretrial judge to remove from the case the issue of the unconstitutional application of the statute to petitioner's properties. In an attempt to render this error innocuous the Court of Appeals said, however, that it became immaterial by reason of the findings of fact of the trial judge which were supported by substantial evidence.

This argument is obviously untenable. Since the constitutional question was removed from the case by the pretrial judge, petitioner was not accorded the right to offer any evidence on this issue or to be otherwise heard. Consequently, she has not been given an opportunity to have a determination of either questions of fact or fundamental questions of law in the first instance by a trial judge.

A party litigant has a right to a determination of the facts in the first instance by the trial court. *Chicago M. & St. P. R. Co.* v. *Tompkins,* 176 U. S. 167, 20 S. Ct. 336; *City of Owensboro* v. *Owensboro Water Works Co.,* 191 U. S. 358 24 S. Ct. 82. All of the evidence should have been considered and passed on by the trial judge before a reviewing court is called on to pass on it. *Wilson Cypress Co.* v. *Del Pozo* v *Marcos,* 236 U. S. 635, 35 S. Ct. 446; *Oklahoma Natural Gas Co.* v. *Russell, et al.,* 261 U. S. 290, 43 S. Ct. 353.

While, therefore, the petitioner was not permitted to urge the unconstitutional application of the statute to her properties, nevertheless, on appeal, the Court of Appeals would rectify this admitted error with the feeble explanation that it is immaterial in any event in view of the findings of the trial judge. Aside and apart from the fact that the findings of the trial judge were made in the absence of any opportunity having been given petitioner to urge this question, there is still another compelling reason why the judgment cannot be permitted to stand.

The findings of the trial judge went far and beyond any issue raised in the case as a result of the findings and action of the Board. Apparently the trial judge proceeded to formulate his own personal inconclusive standards in the case with the result that his findings deal with the occupation of the premises, the grades of the streets, the fire walls and chimneys, the roofs and other extrinsic matters, none of which were alleged as elements constituting "insanitary conditions" in the "specification" (R. 16-23), which lead to the order of condemnation, nor were they alleged to have been repaired by petitioner. But it is on the basis of these improper findings that the Court of Appeals buttresses its decision that even though removal by the pretrial judge of the unconstitutional application of the statute to petitioner's properties was clearly erroneous, nevertheless, it was harmless error. Such is not permissible.

The error is substantial and works a manifest injustice to petitioner since she has never had an opportunity to

have any trial judge or appellate court give due and proper consideration to her contentions.

This court, therefore, should reverse the judgment.

Respectfully submitted,

MINNIE KEYES,
*Petitioner*

W. GWYNN GARDINER
600 Woodward Bldg.
Washington, D. C.

JAMES M. EARNEST
640 Woodward Bldg.
Washington, D. C.
*Attorneys for Petitioner*

## APPENDIX.

D. C. Code, 1940, Sec. 5-601, as follows:

"There is hereby created in and for the District of Columbia a board to be known as the Board for the Condemnation of Insanitary Buildings in the District of Columbia, to consist of the assistant to the engineer commissioner in charge of buildings, the health officer, and the inspector of buildings of said District, and to have jurisdiction and authority to examine into the sanitary condition of all buildings in said District, *to condemn those buildings which are in such insanitary condition as to endanger the health or lives of the occupants thereof or of persons living in the vicinity,* and to cause all buildings to be put into sanitary condition or to be vacated, demolished, and removed, as may be required by the provisions of this chapter. * * *"
(May 1, 1906, 34 Stat. 157, ch. 2073, S 1.)

D. C. Code 1940, Sec. 5-603, as amended December 17, 1942, as follows:

"Said board for the condemnation of insanitary buildings is authorized to investigate, through personal inquiry and inspection by the members thereof, and through inquiry and inspection by officers, agents, and employees, appointed or detailed for that purpose, into the sanitary condition of any building or part of a building in said District, except such as are under the exclusive jurisdiction of the United States. If any building or part of building be found, as a result of such investigation, to be in such insanitary condition as to endanger the health or the lives of the occupants thereof or of persons living in the vicinity, said board shall cause a notice to be served on each owner or part owner of such building requiring him to show cause, within a time to be fixed by the board, why such building or part of building should not be condemned. * * * If the owner or part owner of such building, within the time to show cause fixed by said board, shall in writing request a hearing before said board, said board shall fix a time and place for such hearing and shall notify the person requesting the same. If, within the time to show cause fixed by the board, or at such hearing, if the

same be requested, the owner or part owners shall fail to show cause sufficient in the opinion of a majority of said board to prevent the condemnation of such building or part of building, said board shall issue an order condemning such building or part of building, and shall cause a copy of such order to be served on each owner or part owner thereof, and a copy to be affixed to the building or part of building condemned." (As amended Dec. 17, 1942, 56 Stat. 1054, ch. 762, S. 1.)

D. C. Code 1940, Sec. 5-606, as follows:

"*If the owner or owners of any building or part of building condemned* under the provisions of this chapter *shall make such changes or repairs as will remedy in a manner satisfactory to said board the conditions which led to the condemnation of such building or part of building, said board shall cancel its order of condemnation and the building may be again occupied;* and if such owner or owners can not make such changes or repairs within the period within which they may lawfully permit such building or part of building to be occupied under Section 5-605, but proceed with such changes or repairs with reasonable diligence during that period, said Board may, by special order, extend from time to time the period within which the occupants of said building or part of building may remain therein and within which the owner or owners thereof may permit them so to do." (May 1, 1906, 34 Stat. 158, ch. 2073, S. 6.) (Italics added.)